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No. 05-1120

IN THE

Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Petitioners,
v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

BRIEF FOR ENTERGY CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS*[1]

This case makes for strange bedfellows. *Amicus curiae* Entergy Corporation ("Entergy"), among the nation's largest owners and operators of electric-generating power plants[2], supports the efforts of States and environmental non-government organizations to require the United States Environmental Protection Agency ("EPA" or the "Agency") to recognize its own current authority to regulate carbon dioxide ("CO_2"), consistent with Congress's express directive in the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (the "CAA" or the "Act"). Entergy's position is atypical of an industry largely opposed to CO_2 regulation. This case also presents an atypical agency posture: Instead of over-reaching, EPA has under-reached, and by a country mile.

More specifically, EPA's politically-expedient conclusion that CO_2 is not an "air pollutant" within the meaning of the Act, and hence that EPA lacks any jurisdiction to regulate CO_2 emissions, cannot be reconciled with the plain language of the Act and therefore Congress's intent. The Act's definition of "air pollutant" is broad enough to reach CO_2,

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[1] The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one, other than the *amicus curiae*, provided any monetary contribution to its preparation or submission.

[2] Entergy owns or operates approximately 30,000 megawatts of electric-generating capacity including coal-, gas-, oil- and nuclear-powered facilities, hydroelectric dams, and wind-powered projects. Most of these facilities are subject to extensive regulation under the Act, particularly the many provisions applicable to electric-generating facilities.

and the Act elsewhere specifically refers to CO_2 as an air pollutant. Even were the Act somehow ambiguous on the issue of whether CO_2 is an air pollutant, the Act is most naturally read that way, and EPA's effort to exclude CO_2 is unreasonable. Thus, Entergy disagrees with EPA on the narrow question of EPA's statutory authority to regulate CO_2 under the Act.

The instant case, although grounded in emission standards for new motor vehicles under Section 202(a)(1) of the Act, squarely implicates the electric-generating sector's interests, including Entergy's. On February 27, 2006, EPA promulgated New Source Performance Standards ("NSPS") for steam-electric generation units pursuant to Section 111(b)(1)(B) of the Act that exclude any regulation of CO_2, an omission that is the subject of a current appeal before the District of Columbia Circuit. See *Coke Oven Environmental Task Force* v. *EPA*, Nos. 06-1131, -1148, -1149, -1154, -1155 (D.C. Cir.). In that rulemaking, as in the Agency's rulemaking for new motor vehicles at issue here, EPA asserted that it "does not presently have the authority to set NSPS to regulate CO_2 or other greenhouse gases that contribute to global climate change." 71 Fed. Reg. 9869 (Feb. 27, 2006).[3] While the criteria for issuing regulations under Section 202(a)(1) and Section 111(b)(1)(B) may differ, the underlying question of EPA's authority to regulate CO_2 does not. As such, this Court's determination in this case whether EPA has authority with respect to CO_2 likely will have a determinative impact on the outcome in *Coke Oven Environmental Task Force* and on other EPA initiatives that directly affect Entergy and the entire electric-generating industry.

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[3] The District of Columbia Circuit has granted Entergy *amicus curiae* status in support of the petitioners in the *Coke Oven Environmental Task Force* proceeding.

The energy needs of the United States are expected to double over the next 50 years, and Entergy and its fellow industry members need to plan—and act—now for the strategic capital investments—viewed on a 25-year horizon—that will be necessary to meet this increased demand. Entergy seeks certainty with respect to the regulatory regime it must operate under, and does not believe that EPA's current position on CO_2 regulation will stand the test of time. Not only is that position contrary to the plain language of the Act, but EPA scientists, joined by the National Academy of Scientists (commissioned by the Bush Administration) and the vast majority of the world scientific community, have each concluded that the threat of climate change, while not certain in all of its details, is legitimate. As EPA has recognized, climate change associated with CO_2 emitted by human activities, including power plant operations and motor vehicles, is "'likely to have wide-ranging and mostly adverse impacts on human health, with significant loss of life.'" See U.S. Environmental Protection Agency, Global Warming and our Changing Climate, EPA 430-F-00-011 (April 2000) (quoting Intergovernmental Panel on Climate Change). Given this scientific crescendo and the environmental threat at issue, it is unlikely that EPA will successfully avoid regulating CO_2 emissions for long.

Entergy further believes that the nation's increasing energy demand needs to be met by dependable power generation that substantially reduces or eliminates CO_2 emissions. This will happen, not through the voluntary emissions reduction programs that a select few (such as Entergy) have put into place, but only if proper incentives to limit CO_2 emissions, *e.g.*, price signals relevant to the continued emission of CO_2, are established. At the moment, EPA has chosen instead to preserve the historic energy-generation patterns that contributed to the current environmental threat. EPA's refusal to recognize its authority

to regulate CO_2 fails to appropriately incentivize the development of environmentally responsible power generation to satisfy the nation's energy demand.

EPA's refusal also may compromise this nation's primacy in energy-sector research and development and, therefore, the industry's future. United States leadership in innovative power-production technology rests on the long-held perception that American technology is the gold standard. This perception would be at risk if the nation lags others in developing emission-free power production. Absent CO_2 regulation, the industry lacks the requisite motivation to provide this global leadership.

Finally, Entergy is far less sanguine than EPA about the prospect of this nation's air-quality decisions being decided by the international community. Entergy prefers the considerable safeguards of the CAA rulemaking process, which provides for participation by interested parties sensitive to this nation's needs and fosters (through judicial review under the Administrative Procedures Act) decisions grounded in sound scientific debate. The international debate offers no comparable guarantees, and therefore none of the security of the American rulemaking process.

SUMMARY OF ARGUMENT

On the surface, this case concerns Section 202(a)(i) of the Act, which authorizes EPA to set standards "applicable to the emission of *any air pollutant* from any class or classes of new motor vehicles or new motor vehicle engines," which, in EPA's "judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." See 42 U.S.C. § 7521(a)(1) (emphasis added). Thus, EPA's *authority* to regulate CO_2 turns on whether CO_2 is an "air pollutant" under the Act, and EPA's decision

whether to regulate CO_2 turns on whether the criteria of Section 202(a)(1) have been met.

Until recently, EPA has recognized its authority to regulate CO_2 as an "air pollutant" under the Act. In a precipitous reversal, however, EPA has disavowed that authority based upon the implausible legal contention that CO_2 emissions are not air pollutants under the Act, a contention the Agency grounds in a strained reading of its own authority under the Act and in the suspect contention that United States environmental policy should await international direction. See 68 Fed. Reg. 52922, 52933 (Sept. 8, 2003); see also 71 Fed. Reg. 9869 (Feb. 27, 2006). Entergy disagrees with EPA on both grounds.

Legislation may not invariably reflect Congress's clear intent, but with respect to EPA's authority to regulate CO_2 as an air pollutant, Congress has been both clear and precise. The definition of the term "air pollutant" in Section 302(g) of the Act, which includes "any physical, chemical, biological . . . substance or matter which is emitted into or otherwise enters the ambient air," is sufficiently broad to encompass CO_2. See 42 U.S.C. § 7602(g). Indeed, Section 103(g) of the Act expressly refers to CO_2 as an air pollutant. See *id.*, § 7403(g)(1). Absent violence to the plain language of the statute in a manner incompatible with *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and its progeny, EPA cannot surgically excise CO_2 from the definition of air pollutant under the Act.

Should this Court conclude that the term "air pollutant" is ambiguous as used in Section 302(g) of the Act, EPA's own equivocal history on whether CO_2 is an air pollutant suggests that deference is particularly inappropriate here. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 447 & n.30 (1987). Even affording EPA deference, the Agency's counterarguments fall flat. Contrary to EPA's argument (and among the other

arguments addressed herein), Congress has not made this nation's air-quality policy subject to prior international accord. Even if it had, the international community largely has reached an accord, in the Kyoto Protocol, that favors CO_2 regulation. In any event, the definition of air pollutant in the Act antedates the climate change debate, and thus cannot have informed Congressional thinking with respect to the breadth of EPA's authority to regulate CO_2. Thus, EPA's position is doubly unreasonable—simultaneously incorrect and anachronistic.

For these reasons, Entergy supports Petitioners' request for remand with this Court's direction to EPA to regulate CO_2 emissions pursuant to the Agency's clear statutory authority.

ARGUMENT

I. Carbon Dioxide is an Air Pollutant Within the Plain Meaning of the Clean Air Act.

At its heart, this case concerns the meaning of "air pollutant" in the Act, and in particular whether "air pollutant," as defined by the Act, includes CO_2. EPA concluded that CO_2 is not an air pollutant. Entergy, however, believes that this Court need look no further than the Act's plain language to see that CO_2 is an "air pollutant" within the meaning of the Act. See, *e.g.*, *Chevron*, 467 U.S. at 843 & n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect").

A. Air Pollutants Include Any Substance or Matter that Enters the Ambient Air, Including Carbon Dioxide.

As defined by the Act, "air pollutant" means:

> any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator [of EPA] has identified such precursor or precursors for the particular purpose for which the term 'air pollutant' is used.

42 U.S.C. § 7602(g).

Parsing this statutory language, "air pollutant" is defined as synonymous with "air pollution agent or combination of such agents." *Ibid.* "Air pollutant" and "air pollution agent" are then further defined to include "*any* physical, chemical, biological . . . substance or matter which is emitted into or otherwise enters the ambient air." *Ibid.* (emphasis added).

It is difficult to conceive of a broader definition for air pollutant: It captures "*any* . . . substance or matter" put into the "ambient air." *Ibid.* There is no legitimate argument, and EPA does not assert, that CO_2 is not a "physical [or] chemical . . . substance or matter which is emitted into or otherwise enters the ambient air." *Ibid.* Accordingly, under the plain language of Section 302(g) of the Act, CO_2 is an air pollutant.

Were there any doubt, it would be dispelled by Section 103(g) of the Act. That section instructs EPA to conduct a research program that includes an evaluation of "[i]mprovements in non-regulatory strategies and technologies for preventing or reducing multiple *air pollutants, including . . . carbon dioxide.*" 42 U.S.C. § 7403(g)(1) (emphasis added).[4] Thus, Congress itself

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[4] EPA, in its final rulemaking, misconstrued the text of Section 103(g)(1), suggesting that Congress had distinguished CO_2 from air pollutants, when in fact that section explicitly refers to CO_2 *as* an

expressly has referred to CO_2 as an air pollutant within the Act. The "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." See *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 101 (2003) (internal quotation marks and citations omitted). There is no indication in Section 103(g)(1) that Congress intended "air pollutant" to mean something different than it meant in Section 302(g).

In short, given the broad language in Section 302(g) and the specific reference to CO_2 as an air pollutant in Section 103(g), Entergy submits that CO_2 is an air pollutant within the plain meaning of the Act.

B. Carbon Dioxide Causes Air Pollution Within the Meaning of the Act.

In its final rulemaking, EPA asserted that CO_2 is not an "air pollutant" because, in EPA's judgment, climate change does not constitute "air pollution" within the meaning of the Act, and therefore CO_2 is not an "air pollution agent." See, *e.g.*, 68 Fed. Reg. at 52928.

This argument is meritless for the simple reason, explained above, that "air pollution agent" is itself defined within the Act to include "*any* physical [or] chemical . . . substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g). This Court has repeatedly interpreted the word "any," including as used in the Clean Air Act, to have an expansive meaning. See, *e.g.*, *Harrison* v. *PPG Indus., Inc.* 446 U.S. 578, 588–89 (1980) ("we agree with the petitioners that the phrase, 'any other final action,' in the absence of legislative history to the

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air pollutant. See 68 Fed. Reg. at 52926 (describing Section 103(g) as calling for research into "several air pollutants *and* CO_2," and into "CO_2 *as well as* several specified air pollutants" (emphases added)).

contrary, must be construed to mean exactly what it says, namely, *any other* final action" (emphasis in original)); see also *New York* v. *EPA*, 443 F.3d 880, 885–87 (D.C. Cir. 2006) (rejecting EPA interpretation of the Act that "would make Congress's use of the word 'any' insignificant if not superfluous" (internal quotation marks and citation omitted)).

In addition, the Act nowhere defines "air pollution." However, because the phrase "any physical, chemical, biological . . . substance or matter which is emitted into or otherwise enters the ambient air" is an included exemplary subset of "air pollution agent," it is a logical and linguistic imperative that the term "air pollution agent," for purposes of the Act, is even broader than that subset definition. See 42 U.S.C. § 7602(g); see also *Chickasaw Nation* v. *United States*, 534 U.S. 84, 89 (2001) (reciting dictionary definition: "to include is to contain or comprise *as part* of a whole" (emphasis added; internal quotation marks and citation omitted)).

Respondents have suggested that Congress could not really have intended the Act to cover "*any* physical, chemical, biological . . . substance or matter which is emitted into or otherwise enters the ambient air," including CO_2, because under such a broad definition even baseballs thrown into the air are at risk of being regulated under the Act. See Joint Brief of Industry Intervernor-Respondent, *Commonwealth of Massachusetts v. EPA*, No. 03-1361, 2005 WL 257457, *10 (D C. Cir. Jan. 25. 2005). Our national pastime is not at risk, however, as the *regulation* of air pollutants, such as CO_2, requires EPA first to find sufficient evidence of a possible endangerment to public health or welfare—*e.g.*, either under Section 202 or Section 111—a result EPA is unlikely to reach in the case of tossed baseballs. That said, EPA has long acknowledged, and routinely exercises, its authority to classify as "air pollutants" man-made material—including material that is not inherently harmful or dangerous. For

instance, the regulated air pollutant "particulate matter" consists simply of solids of a particular size and configuration, the dispersion of which in the environment in certain quantities can cause visibility impairment and other negative environmental and health effects. See, *e.g.*, 42 U.S.C. § 7407(d)(4)(B) (discussing designated nonattainment areas for particulate matter-10); see also 36 Fed. Reg. 1502 (Jan. 30, 1971) ("Particulate matter refers to any matter dispersed in the air, whether solid or liquid, in which the individual particles are larger than small molecules but smaller than 500 microns"). Thus, a baseball, or the dust emitted by a slide into second base, may be an air pollutant, albeit one unlikely to be regulated, at least by EPA.

Assuming, however, for purposes of argument, that "air pollution" has some narrower meaning, it nonetheless remains clear that CO_2 is an "air pollution agent," and hence an "air pollutant," within the meaning of the Act.

1. *The Act Specifically Describes Climate Change as an Effect of Air Pollution.*

Under the Act, EPA is required to regulate air pollutants emitted, *e.g.*, from automobiles, "which in [the Administrator's] judgment cause, or contribute to, *air pollution* which may reasonably be anticipated to endanger public health or *welfare*." 42 U.S.C. § 7521(a)(1) (emphases added). In 1970, the Act was amended specifically to provide that "[a]ll language referring to effects on *welfare includes ... effects on ... weather ... and climate*." 42 U.S.C. § 7602(h) (emphasis added). Thus, Congress specifically and in plain language equated "air pollution" and "effects on ... climate." Under EPA's reading of the Act, it can only consider the effect of an emission on "climate," and hence on human welfare, if the emission is already considered an "air pollutant" for some other, non-climate-related reason. This would, for no apparent reason, leave unregulated some

emissions endangering human welfare through effects on climate, a danger that Congress has explicitly directed EPA to address. See 42 U.S.C. §§ 7521(a)(1), 7602(h). Such a reading of the Act is not only unsupported by the text, it requires this Court to disregard an unequivocal Congressional directive.

2. *The Plain Meaning of "Air Pollution" Includes Emissions that Cause Climate Change.*

In ordinary parlance, "pollution" means:

> [t]he action of polluting, or condition of being polluted; defilement; uncleanness or impurity caused by contamination (physical or moral). *spec.* The presence in the environment, or the introduction into it, of products of human activity which have harmful or objectionable effects.

Oxford English Dictionary (2nd ed. 1989).[5]

Similarly, the rulemaking at issue notwithstanding, EPA routinely defines air pollution in a broad manner, including in policy statements relating to emissions linked to climate change. See, *e.g.*, EPA Office of Policy: Inventory of U.S.

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[5] See also Random House Dictionary of the English Language (2nd ed. 1987) (defining pollution as "1. the act of polluting or the state of being polluted. 2. the introduction of harmful substances or products into the environment: *air pollution.*"); American Heritage Dictionary (4th ed. 2000) (defining pollution as "1. The act or process of polluting or the state of being polluted, especially the contamination of soil, water, or the atmosphere by the discharge of harmful substances. 2. Something that pollutes; a pollutant or a group of pollutants: *Pollution in the air reduced the visibility near the airport.*"); Black's Law Dictionary (7th ed. 1999) (defining air pollution as "[a]ny harmful substance or energy emitted directly or indirectly into the air, esp. if the harm is to the environment or to the public health or welfare").

Greenhouse Gas Emissions and Sinks. Annex T: Glossary (defining "air pollution" as "[o]ne or more chemicals or substances in high enough concentrations in the air to harm humans, other animals, vegetation, or materials. Such chemicals or physical conditions (such as excess heat or noise) are called air pollutants")[6]; see also EPA Terms of Environment: Glossary, Abbreviations and Acronyms (defining "air pollution" as "[t]he presence of contaminants or pollutant substances in the air that interfere with human health or welfare, or produce other harmful environmental effects").[7] Furthermore, EPA has approved the state implementation plans of many States that also define air pollution in a broad manner that would include CO_2.[8]

In light of these definitions, there can be no real debate that CO_2 emissions into the ambient air from human activities (such as burning fossil fuels), to the extent they do cause climate change, would constitute "air pollution" as that phrase is commonly understood. EPA's own statements are sufficient to illustrate this point. See, *e.g.*, EPA, Global

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[6] Available at http://iaspub.epa.gov/trs/trs_proc_qry.alphabet?p_term_nm=A&p_reg_auth_id=1&p_data_id=20023&p_version=1 (last visited on Aug. 30, 2006).

[7] Available at http://www.epa.gov/OCEPAterms/aterms.html (last visited on Aug. 29, 2006).

[8] See, *e.g.*, US Environmental Protection Agency, State Implementation Plans, available at, http://www.epa.gov/region5/air/sips/index.html (providing, for example, Illinois definition of "air pollution" and "air contaminant" respectively as "the presence in the atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health or to property, or to unreasonably interfere with the enjoyment of life or property" and "any solid, liquid, or gaseous matter, any odor, or any form of energy, that is capable of being released into the atmosphere").

Warming-Climate: Uncertainties (stating that "[g]lobal warming poses real risks" and "[s]cientists have identified that our health, agriculture, water resources, forests, wildlife and coastal areas are vulnerable to the changes that global warming may bring").[9] Indeed, it strains credulity to argue that CO_2 emissions do not have "harmful or objectionable effects" or "harmful environmental effects" given the Administration's own "ambitious goal" of cutting the intensity of such emissions by the U.S. economy; if this "ambitious goal" were unconnected to human health or welfare, it would do nothing more than try the nation's patience.[10]

3. *Congress and EPA Have Elsewhere Referred to Carbon Dioxide Emissions and Resulting Climate Change as Air Pollution.*

If the text of the Act and the commonplace meaning of "air pollution" were not plain enough, Congress repeatedly has described CO_2 emissions in other environmental and climate-change legislation as air pollution, often citing the effect of such emissions on the global climate. Thus, Congress has expressly stated:

> The Congress finds as follows: (1) [T]here exists evidence that manmade *pollution* – the *release of carbon dioxide . . . into the atmosphere* – may be producing a long term and substantial increase in the average temperature on Earth . . . .

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[9] Available at http://yosemite.epa.gov/OAR/globalwarming.nsf/content/ClimateUncertainties.html (lasted visited on August 30, 2006)

[10] See U.S. Department of State, Action on Climate Change, Energy and Sustainable Development (July 8, 2005), available at http://www.state.gov/g/oes/rls/fs/49266.htm.

Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. 100-204, § 1102(1), 101 Stat. 1331, 1408 (1987) (emphasis added).

Tellingly, in P.L. 105-276 (1998), Congress prohibited EPA from issuing regulations implementing the Kyoto Protocol, which would have restricted signatory nations' emissions of CO_2.[11] While it cannot be denied that Congress can and does engage in acts of political speech, P.L. 105-276 suggests that Congress believed that EPA had existing authority to implement the Kyoto Protocol's restrictions on CO_2 emissions. Such authority, of course, would be found in the Act.

Other statutes compelling ongoing climate-change research also support EPA's authority to regulate CO_2 under the Act. For instance, in 1990, Congress passed the Global Change Research Act of 1990 ("GCRA") to provide for the development and coordination of a comprehensive and integrated United States research program "that will assist the Nation and the world to understand, assess, predict, and respond to human-induced and natural processes of global change." Pub. L. No. 101-606, § 101(b), 104 Stat. 3096, 3097 (1990). The GCRA provides:

> Nothing in this title shall be construed, interpreted, or applied to preclude or delay the planning or implementation of any Federal action designed, in

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[11] Veterans Affairs and HUD Appropriations Act, 1999, Pub. L. 105-276, 112 Stat. 2461, 2496 (1998) ("none of the funds appropriated by this Act shall be used to propose or issue rules, regulations, decrees, or orders for the purpose of implementation, or in preparation for implementation, of the Kyoto Protocol"). Of course, this language only limits EPA's authority to implement the Kyoto Protocol; the statute does not otherwise restrict EPA's ability to issue regulations under the Act if the statutory criteria for such regulation are satisfied.

> whole or in part, to address the threats of stratospheric ozone depletion *or global climate change*.

Id. at § 108(c), 104 Stat. at 3102 (emphasis added). Such a savings clause would have been unnecessary if, as EPA asserts, agents of global climate change, such as CO_2, could not be regulated under the CAA.

In short, enacted legislation resoundingly reflects Congress's assumption that EPA has authority to regulate CO_2 emissions.

C. The History of Amendments to the Act Further Supports EPA's Authority to Regulate Carbon Dioxide.

The history of amendments to the Act further supports the conclusion that the Act provides EPA authority to regulate CO_2. As noted above, in 1970, the Act was amended to provide that effects on "weather" and "climate" are to be considered in judging whether an emission endangers human welfare. See *supra* at 10.

In 1977, the definition of "air pollutant" in the Act was amended from "an air pollution agent or combination of such agents" to "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive ... substance or matter which is emitted into or otherwise enters the ambient air." See Clean Air Act Amendments of 1977, Pub. L. 95-95, § 301(c), 91 Stat. 685, 770 (1977). The House Committee Report issued in connection with the 1977 amendments explained:

> [T]he Clean Air Act is *the comprehensive vehicle* for protection of the Nation's health from air pollution. *In the committee's view, it is not appropriate to exempt certain pollutants or certain sources from the comprehensive protections afforded by the Clean Air Act.*

H.R. Rep. No. 95-294, at 42, 1977 U.S.C.C.A.N. 1077, 1120 (1977) (emphasis added) ("1977 House Committee Report").

In 1990, Congress again amended the definition of "air pollutant," clarifying that "precursors to the formation of any air pollutant" also constitute air pollutants "to the extent the Administrator [of EPA] has identified such precursor or precursors for the particular purpose for which the term 'air pollutant' is used." See 42 U.S.C. § 7602(g). In other words, EPA's authority extends even beyond emissions that themselves constitute air pollutants. The 1990 amendment underscores the breadth of EPA's authority.[12]

D. EPA's Parade-of-Horribles Argument Does Not Detract from the Plain Meaning of the Act.

In arguing against recognizing CO_2 as an air pollutant within the plain meaning of the Act, EPA has asserted that, despite all contrary indications, Congress cannot have meant for CO_2 to be an "air pollutant" because the political and economic impact of regulating CO_2 would be too severe, and the science surrounding CO_2 emissions is still uncertain. See 68 Fed. Reg. at 52928.

Of course, the status of a substance as an "air pollutant" subject to EPA's authority does not mean that regulations for such a substance are automatically mandated. Rather, the Agency's obligation to promulgate regulations for air pollutants, such as CO_2, is triggered when the requisite

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[12] This broad assignment of authority to EPA to regulate precursors is likewise consistent with Congress's intent, expressed while preparing the 1977 amendments to the Act, to "emphasize the preventative or precautionary nature of the act, *i.e.*, to assure that regulatory action can effectively prevent harm before it occurs; to emphasize the predominant value of protection of public health." 1977 House Committee Report, H. Rep. No. 95-294 at 49, 1977 U.S.C.C.A.N. at 1127.

criteria, set forth in various parts of the Act, are satisfied, including in this case EPA's judgment that the pollutants "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). Under the Act, EPA possesses the flexibility to regulate air pollution in a cost-effective manner. Consequently, EPA's parade-of-horribles argument is both irrelevant on its face and meritless in fact, and should not be permitted to distract from the relatively simple plain-language question before the Court.[13]

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[13] Not having participated in the underlying rulemaking effort, Entergy does not address herein whether particular criteria requiring specific regulations under Section 202 for emission standards for new motor vehicles or engines have been satisfied. Entergy does believe, however, that the requisite criteria for issuing a NSPS for CO_2 emissions from electric utility steam generation units, enumerated in Section 111 of the Act, have been satisfied. See 42 U.S.C. § 7411(b)(1)(A) (requiring EPA to regulate stationary sources, i.e. any "building, structure, facility, or installation which emits or may emit any air pollutant," that, in the Administrator's judgment "caus[e], or contribut[e] *significantly to*, air pollution which may reasonably be anticipated to endanger public health or welfare") (emphasis added). The criteria for issuing regulations under Section 111 are more stringent than those applicable under Section 202(a), which requires EPA to establish standards for the emission of air pollutants that the Administrator, in his judgment, determines "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." See 42 U.S.C. § 7521(a)(1). Thus, the criteria for regulation under Section 202(a) are a subset of the criteria applicable to stationary sources under Section 111.

II. EPA'S Conclusion that Carbon Dioxide is Not an Air Pollutant under the Clean Air Act is Unreasonable.

Should this Court conclude that CO_2's status as an "air pollutant" within the meaning of the Act is ambiguous, the question becomes whether EPA is entitled to deference on this issue, and whether EPA's interpretation of the Act, under which CO_2 is not a pollutant, is reasonable. See *Chevron*, 467 U.S. at 843; see also *Gonzales* v. *Oregon*, 126 S.Ct. 904, 908 (2006) ("*Chevron* deference ... is not accorded merely because the statute is ambiguous and an administrative official is involved"). Entergy submits that the answer to both questions is no. Any deference due to EPA is diminished by EPA's abandonment of the earlier opinion of two EPA general counsels that CO_2 is a pollutant within the meaning of the Act. Whatever level of deference is granted EPA, the grounds for the Agency's decision that CO_2 is not a pollutant under the Act are unreasonable.

A. This Court Should Not Defer to EPA's Change in Policy Concerning its Own Jurisdiction.

While deference is normally accorded an agency in interpreting an ambiguous statute that the agency is charged with administering, agency inconsistency in interpreting a statute is grounds for a reviewing court to take a harder look at the reasonableness of the agency interpretation. See *Good Samaritan Hospital* v. *Shalala*, 508 U.S. 402, 417 (1993) ("the consistency of an agency's position is a factor in assessing the weight that position is due"). As this Court stated in *Cardoza-Fonseca*, 480 U.S. at 446 n.30, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to

considerably less deference than a consistently held agency view" (internal quotation marks and citation omitted).[14]

In this case, any deference owed EPA's interpretation of "air pollutant" is diminished by EPA's reversal of an earlier conclusion at the highest levels—the prior opinions of two EPA general counsels—that CO_2 is an air pollutant within the meaning of the Act, in favor of the opinion of EPA's new general counsel that CO_2 is not. See 68 Fed. Reg. at 52925 ("Two EPA General Counsels previously . . . found that CO_2 meets the CAA definition of 'air pollutant'"). Thus, this case is worlds removed from the typical case in which a purported "change" in agency position is actually an evolution, instead of a revolution, in policy, in light of pertinent new information.

A brief history underscores the starkness of the change in policy at issue here. In an April 10, 1998 memorandum, then-General Counsel Jonathon Cannon responded to a request from Rep. Tom DeLay for EPA's position on whether CO_2 is an air pollutant under the Act.[15] General Counsel Cannon

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[14] In addition to concerns over the relative accountability of Article III judges and Article I agencies, the precept of deference rests on the twin assumptions that regulatory expertise matters and that an agency's thoughtful application of law warrants favor. See, *e.g.*, *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U.S. 633, 651–652 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference"). Both of these precepts are appropriately diminished where the agency's opinion on a straightforward question of statutory construction going to the scope of its authority varies for politically expedient reasons.

[15] At a hearing before the House Appropriations Committee, Congressman DeLay challenged a statement by EPA, in a document entitled "Electricity Restructuring and the Environment: What Authority Does EPA Have and What Does it Need," that EPA had authority under the Act to regulate CO2 emissions. In response, then-EPA Administrator Carol Browner testified that she

concluded that it is. See Memorandum from Robert E. Fabricant, General Counsel, EPA, to Marianne Horinko, Acting EPA Administrator, at 2 (Aug. 28, 2003) ("Fabricant Memo."). Subsequently, on October 6, 1999, then-General Counsel Gary Guzy, focusing on the statutory language, reaffirmed General Counsel Cannon's answer in testimony before Congress. See *id.* at 3.

EPA's legal position suddenly changed on August 28, 2003, when General Counsel Robert Fabricant volunteered the opposite conclusion on this very question of statutory interpretation, despite the absence of any supporting change in the underlying science or in the text of the Act. See Fabricant Memo. at 4. General Counsel Fabricant attempted to justify his changed opinion as being a response to this Court's decision in *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). As he explained the reversal of EPA's position, *Brown & Williamson* required a revaluation of the authority granted by Congress to EPA to regulate CO_2. See Fabricant Memo. at 4.

As explained further herein, that supposed basis for reconsidering the definition of "air pollutant" within the meaning of the CAA is dubious at best—the facts in *Brown & Williamson* bear no resemblance to the circumstances of this case. See *infra* at 24–25. Rather, it is clear that General Counsel Fabricant's new opinion simply reflected a change in agency policy away from regulating CO_2. The Act's definition of air pollutant, however, is straightforward, and the Act does not explicitly provide for any Agency discretion in determining whether a particular emission is an "air pollutant." See *supra* at 6–8. Agency discretion instead appears in judging which air pollutants endanger human "health or welfare" and thus should be the subject of

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agreed with the document's statement. Congressman DeLay then asked EPA for a formal legal opinion on the subject.

regulation by EPA. See 42 U.S.C. § 7411(b)(1)(A), and in the exact structure of any resulting regulatory program. Whatever EPA's ability to change its mind on *those* issues as a matter of policy or in light of changed facts, one would not expect variation in the answer to the basic question of what Congress meant by "any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. §7602(g).

Deference to EPA's new position on the meaning of "air pollutant" is also inappropriate for two additional reasons. First, deference to an agency interpretation is strongest when the agency construes the act contemporaneously with its passage. See, *e.g.*, *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 142 (1976). Here, EPA is construing the CAA decades after its passage, and in a manner inconsistent with its own prior interpretation. Second, deference to an agency is properly diminished where the question is the scope of the agency's authority. As this Court aptly put it in *Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944), "[t]he determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." This common-sense approach has been confirmed by numerous circuit courts in the post-*Chevron* era. See, *e.g.*, *Northern Illinois Steel Supply Co.* v. *Secretary of Labor*, 294 F.3d 844, 846–47 (7th Cir. 2002); *New York Shipping Ass'n, Inc.* v. *Fed. Mar. Comm'n*, 854 F.2d 1338, 1363 (D.C. Cir. 1988); *Bolton* v. *Merit Syst. Prot. Bd.*, 154 F.3d 1313, 1316 (Fed. Cir. 1998).

In summary, because EPA has, without a sound legal basis, changed its position on the interpretation of a basic statutory phrase that is unrelated to EPA's discretion under the Act, but is related to the Agency's jurisdiction, this Court should grant little—if any—deference to EPA's current position.

B. EPA's Interpretation of the Act is Unreasonable.

In interpreting the Act's definition of "air pollutant" to exclude CO_2, EPA made a number of interpretive errors. Viewing these errors both individually and as a whole, it is clear that EPA's interpretation of the Act was unreasonable.

1. *EPA's Reliance on Diplomatic Considerations Was Unreasonable.*

EPA's justification of its interpretation of the Act by reference to negotiation of the Kyoto Protocol is especially troubling. See 68 Fed. Reg. at 52927. According to EPA, it is somehow relevant, in interpreting language placed in the Act in the 1960s and 1970s, that in 1998 the Senate passed a resolution stating that the U.S. should not be a signatory to the Kyoto Protocol, if the Protocol would harm the U.S. economy or failed to mandate "specific, scheduled commitments to limit or reduce GHG emissions for developing countries." *Ibid.*

Nowhere in the Act, however, is there any suggestion that whether an emission constitutes an "air pollutant" within the meaning of the Act depends upon the treaty obligations of foreign states. The inappropriateness of EPA's attempt to read the current state of diplomatic play into the Act's definition of "air pollutant" is clear both as a matter of first principles, and in light of this Court's recent decision in *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001). In that case, the precise question was whether EPA could consider compliance costs in declining to issue National Ambient Air Quality Standards ("NAAQS"). In rejecting arguments that ambiguous wording in the statute granted EPA such discretion, the Court noted:

> Just as we found it highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to

> agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements, so also we find it implausible that Congress would give to the EPA through these modest words the power to determine whether implementation costs should moderate national air quality standards.

Id. at 468 (internal quotation marks and citation omitted). The Court went on to note that implementation compliance cost is "so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned ... had Congress meant it to be considered" in deciding whether to issue NAAQS. *Id.* at 469.

This Court's statements concerning implementation cost in *American Trucking* are even more apt here. EPA can point to *no* language—let alone ambiguous language of the sort found insufficient in *American Trucking*—to justify its consideration of the vagaries of diplomacy in determining whether CO_2 is an "air pollutant." Like cost, foreign policy considerations are both "indirectly related to public health" and "full of potential for canceling conclusions drawn" from public health and welfare analysis. The status of CO_2 as an air pollutant within the meaning of the Act does not vary based upon whether the governments of developing countries have committed by treaty to regulate CO_2. Simply put, there is no basis under the Act to permit the environmental policies of foreign governments, from Afghanistan to Zimbabwe, to bear on the interpretive question whether CO_2 is an air pollutant within the meaning of the Act. Cf. *Roper* v. *Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) (in interpreting U.S. Constitution, "the basic premise ... that American law should conform to the laws of the rest of the world—ought to be rejected out of hand").

As if this were not clear enough, Congress has explicitly provided in the Act that U.S. environmental regulations shall not be forestalled because of potential impacts on or from emissions in foreign countries. See, *e.g.*, 42 U.S.C. § 7509a(2) (providing that the EPA Administrator may approve state implementation plans even if such plans do not demonstrate attainment and maintenance of relevant NAAQS provided that the submitting State can establish that the plan would be adequate but for "emissions emanating from outside of the United States"). Thus, there is no credible legal basis for EPA's limiting its authority to regulate CO_2 emissions based on the purportedly unresolved international debate.

2. *EPA's Argument that the Act Does Not Specifically Provide for Regulation of Carbon Dioxide is Meritless.*

Ignoring the Act's definition of "air pollutant," EPA contends that the Act only allows the study of CO_2, but does not specifically provide for CO_2's regulation. According to EPA, if Congress had wished to have EPA regulate CO_2, it would have enacted specific statutory provisions governing CO_2, as it did for ozone-destroying agents. See 68 Fed. Reg. at 52926. Otherwise, EPA frets—in an argument based almost entirely on the non-analogous facts present in *Brown & Williamson*—that it may enact regulations imposing broad economic and political impacts without a direct mandate from Congress. See *id.* at 52925–26.

In *Brown & Williamson*, this Court considered substantial evidence, in the form of enacted legislation, that Congress did not wish to ban the sale of tobacco products. 529 U.S. at 137–39. No comparable history exists here. EPA relies on proposed legislation that was *not* enacted, see 68 Fed. Reg. at 52927–28, but such reliance as a basis for interpreting an earlier enacted statute is sorely misplaced. See *United States* v. *Craft*, 535 U.S. 274, 287 (2002) ("failed legislative

proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute") (internal quotation marks and citation omitted).[16] EPA also relies on the existence of legislation specifically calling for the *study* of the effects of CO_2 emissions. See 68 Fed. Reg. at 52926. Congress's call for the study of an emission, however, is not inconsistent with an intention that the emission should be regulated under existing legislation if the study shows that the Act's trigger for regulation (EPA's judgment that the emission endangers public health or welfare) is met. The mandate, instead, easily can be viewed as Congress spurring the agency toward action in a matter already committed to the agency's authority.

In any event, as noted above the Act specifically provides that "[a]ll language referring to effects on welfare includes ... effects on ... weather ... and climate." 42 U.S.C. § 7602(h). Thus, the Act already contains explicit authority for the regulation of emissions shown to impact "weather ... and climate," as CO_2 is alleged to do. EPA asserts that Congress should have spoken more clearly, but Congress has spoken as clearly as possible; EPA has simply, and inexplicably, chosen not to listen.

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[16] The proposals referenced by Respondents, which would have set CO_2 emissions standards for passenger cars and for vehicles that use low-polluting fuels, actually support Petitioners' contention that EPA has the authority to regulate CO_2. The suggested language did not specifically assign EPA the authority to regulate CO_2, but instead, assuming that such authority existed, set specific regulations that were deemed warranted based on the effects of CO_2. See, *e.g.*, S. Rep. No. 101-228, at 98–101, 1990 U.S.C.C.A.N. 3385, 3483–86 (1990).

3. *EPA's Consideration of the Feasibility of Regulation was Improper.*

In determining that CO_2 is not an air pollutant, EPA also asserted that regulation of CO_2 under the Act is not feasible. See 68 Fed. Reg. at 52927 ("In assessing the availability of CAA authority to address global climate change, it is also useful to consider whether the NAAQS system . . . could be used to effectively address the issue"). EPA's interpretation, under which the feasibility of regulating an emission is pertinent to whether that emission is an "air pollutant" in the first place, is an unreasonable reading of the Act.

The plain error in EPA's position is confirmed by various provisions of the Act, including the very provision at issue. Congress specifically addressed feasibility concerns, not through the definition of "air pollutant," but elsewhere in the Act.[17] For example, the Act addresses potential feasibility concerns associated with regulations under Section 202(a)(1) by providing that any such regulation shall:

> take effect after such period as the [EPA] Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

42 U.S.C. § 7521(a)(2).

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[17] EPA's interpretation of the term "air pollutant," under which feasibility of regulating a particular emission under the CAA can be considered in determining whether that emission is an "air pollutant," has the potential to render these other provisions of the CAA mere surplusage, and for that additional reason is improper. See *Dunn* v. *Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997) ("legislative enactments should not be construed to render their provisions mere surplusage").

Similarly, the definition of "standard of performance" applicable to stationary sources, including Entergy's electric-generating facilities, provides:

> The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

42 U.S.C. § 7411(a)(1). As this definition makes clear, whether something is an air pollutant does not depend upon "the degree of emission limitation achievable" (or the "cost of achieving such reduction"). Those considerations bear instead on the form of any standard of performance enacted with respect to an emission already determined to be an air pollutant. See also 42 U.S.C. § 7409(b)(1).

The Act's NAAQS provisions also demonstrate that the feasibility of regulating a particular emission is irrelevant to that emissions status as an "air pollutant." In the context of NAAQS, the Act calls for EPA to publish a list of air pollutants for which EPA "plans to issue air quality criteria under this section":

> For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant - (A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; (B) the presence of which in the ambient air results from

> numerous or diverse mobile or stationary sources; and (C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.

42 U.S.C. § 7408(a)(1). As this section confirms, whether or not EPA ultimately decides to "issue air quality criteria under this section" for a given emission—a decision in which EPA may exercise reasonable judgment—has no bearing on whether that emission is an "air pollutant" in the first place. Air pollutants that EPA plans to regulate are simply a subset of all air pollutants as defined by the Act.[18]

Even as a matter of common sense, the feasibility of successfully regulating the effects of a particular substance has no bearing on whether that substance is, in fact, an air pollutant. Under EPA's reading of the Act, it can avoid the hard work of considering how to regulate certain emissions simply by declaring them not to be pollutants in the first place. It is as if, to escape the trouble of disciplining an unruly child, a parent insisted that the child's behavior was flawless. Such an interpretive sleight-of-hand finds no refuge in the text of, or policies underlying, the Act.

EPA's reliance on feasibility is not only flawed statutory interpretation, it is unsound policy. Technological innovation is spurred by incentives, and governmental regulation is one, often significant, incentive to the development of pollution-control technology. EPA's conclusion that certain pollutants can be ignored would only help to lock in place the *status quo* and inhibit technological innovation, effectively undermining the economics of solving the climate change dilemma.

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[18] EPA's proposed statutory construction lacks visceral appeal viewed even from EPA's perspective, as requiring EPA in advance to establish the feasibility of regulation would complicate the otherwise straightforward process of adding air pollutants.

CONCLUSION

For the foregoing reasons, this Court should remand this rulemaking to the EPA with instructions to appropriately exercise its authority to regulate CO_2 emissions under the CAA.

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